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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1289-21**

ALEXANDER BRIUKHAN,

Plaintiff-Respondent,

v.

SEVEN D's, INC.,

Defendant-Respondent.

GROVE ENTERPRISE, LLC
and KULDIP PATWALIA,

Appellants.

Submitted November 29, 2022 – Decided December 30, 2022

Before Judges Messano and Paganelli.

On appeal from the Superior Court of New Jersey,
Chancery Division, Hudson County, Docket No. C-
000077-20.

Mariniello & Mariniello, PC, attorneys for appellants
(Joseph R. Mariniello, Jr., of counsel and on the briefs).

Cullen and Dykman LLP, attorneys for respondent (Daniel S. Eichhorn and Paul N. Ambrose, Jr., of counsel and on the brief; Steven Siegel, on the brief).

PER CURIAM

In April 2020, plaintiff Alex Briukhan and defendant Seven D's, Inc. (Seven D's) executed a contract (the initial contract) for the sale of real property in Jersey City (the Property). Seven D's had previously leased the Property to Kuldip Patwalia, who was operating a gas station on the premises.¹ Briukhan agreed to pay \$1 million for the Property, along with its structures and fixtures, but he was not purchasing the retail service station business. The contract contained no mortgage or inspection contingencies and stated the estimated closing date was May 8, 2020.

On May 18, Briukhan sued Seven D's (the initial lawsuit), alleging that on May 4, Seven D's unilaterally terminated the contract and returned his \$100,000 deposit. Briukhan sought specific performance under the terms of the contract, and, on June 3, 2020, he filed a lis pendens on the Property.

In the interim, on May 20, Seven D's entered into a contract to sell the Property to Patwalia for \$1.5 million (the second contract). The second contract included Seven D's' agreement to take back a \$750,000 mortgage in

¹ The undated lease agreement is in the record.

Patwalia's favor, and it contained the following "Pending Litigation" provision:

Due to the on-going discussions between [Patwalia] and [Seven D's], [Seven D's] has been informed of a potential lawsuit by a [third-]party who previously showed interest to purchase the Property and signed a Real Estate Contract of Sale which was terminated by . . . [Seven D's]. [Patwalia] has agreed to participate in [Seven D's'] defense of same and contribute [one-third] of any reasonable attorney fees and [one-third] of any potential settlement of the suit. [Seven D's'] agrees that any settlement shall be subject to the prior approval of [Patwalia], not to be unreasonably withheld.

On June 24, 2020, Patwalia assigned the second contract to Grove Enterprises, LLC (Grove).² Four days later, Seven D's attorney supplied Grove with a copy of Briukhan's complaint. Grove did not move to intervene in the lawsuit.

Seven D's and Briukhan ultimately settled the initial lawsuit. Under the written "Settlement Terms Sheet," Briukhan agreed to pay \$1.55 million for the property; Seven D's agreed to deliver "clear title" at closing and to discharge any UCC filing by the supplier of fuel to the service station. On February 16, 2021, the court filed a consent stipulation of dismissal of the initial lawsuit with prejudice executed by counsel for Briukhan and Seven D's.

² We refer to Patwalia and Grove collectively as "Grove" for the balance of this opinion.

One week later, Grove filed a complaint against Seven D's alleging fraud and breach of the second contract (the second lawsuit). Asserting the anticipated closing between Briukhan and Seven D's had not yet occurred, Grove sought, among other relief, specific performance of its contract with Seven D's. Within days, Grove also filed a lis pendens on the Property, but it did not move to set aside the settlement and reopen the initial lawsuit between Briukhan and Seven D's, and it did not move to consolidate the two lawsuits.

The closing between Briukhan and Seven D's did not occur as anticipated and, in September 2021, Briukhan moved to enforce the February settlement and discharge Grove's lis pendens. Grove opposed Briukhan's motion, and, for the first time, Grove cross-moved to intervene in the initial lawsuit and consolidate both lawsuits.

The Chancery judge, Mary K. Costello, rendered an oral opinion following argument. Judge Costello rejected Grove's argument that Seven D's could not settle the initial lawsuit with Briukhan because of the "Pending Litigation" provision in the second contract that required Grove's consent to any settlement of the initial lawsuit between Briukhan and Seven D's. The judge reasoned Seven D's had "complete authority to settle that matter, but they will also have to live with the consequences."

The judge also concluded Briukhan was entitled to enforce the terms of his settlement agreement with Seven D's, noting "settlement is a principle that ranks high in our public policy." The judge reasoned there was no evidence "of fraud or compelling circumstances to disturb the settlement and cast any judicial aspersions on the underlying contract in this case." Judge Costello then considered N.J.S.A. 2A:15-7 and Rule 4:63(a) and concluded Grove's lis pendens should be discharged.

Lastly, the judge considered Grove's motion to intervene, noting it was "long past the appropriate time to do so" since "there [wa]s nothing to intervene in," given her decision to enforce the settlement of the initial lawsuit. The judge noted that Grove could still pursue the second lawsuit against Seven D's because "[t]he only . . . [e]ffect of [her] decision, [wa]s [to] remove[] the specific performance remedy" The judge's October 8, 2021 order: 1) discharged Grove's lis pendens; and 2) ordered Seven D's to conduct a closing and convey clear title to the Property to Briukhan within sixty days.³

³ Briukhan advises that Seven D's conveyed title to the Property in April 2022, after this appeal was filed.

Grove moved for reconsideration.⁴ It argued that the Entire Controversy Doctrine required Briukhan, who was aware of the negotiations between Grove and Seven D's, to bring Grove into the initial lawsuit he filed against Seven D's. Grove again argued that its contract with Seven D's prohibited settlement of the initial lawsuit without Grove's approval.

Judge Costello rejected Grove's arguments, reasoning Grove failed to consider that the initial lawsuit settled on February 16, 2021, that Grove entered into the second contract with full knowledge of the initial contract between Briukhan and Seven D's, and Grove "should have and did not, to their detriment, intervene in the [initial lawsuit]."⁵ The judge said "it [wa]s disingenuous to argue that . . . [Briukhan was] at fault for not bringing in a party who was not a party to the contract or the settlement agreement." The judge's November 19, 2021 order denied Grove's reconsideration motion, and this appeal followed.

⁴ We were supplied only with the transcript of the argument on Grove's motion for reconsideration and Briukhan's counsel's certification in opposition.

⁵ Grove maintains that Seven D's never advised it of an actual contract with Briukhan, "only that there was another interested purchaser in the property." This is belied by the actual language of the "Pending Litigation" provision of the second contract. More importantly, there is no dispute that Grove was aware of the initial lawsuit prior to filing its own complaint against Seven D's shortly after the initial lawsuit settled and never sought to intervene until it cross-moved in response to Briukhan's motion to enforce the settlement.

Grove argues Judge Costello erred in enforcing Briukhan's settlement and discharging Grove's lis pendens. Grove contends that the judge should have granted its motion to intervene as of right under Rule 4:33-1, or by permission under Rule 4:33-2. Lastly, Grove argues its suit against Seven D's should be consolidated with the currently dismissed, but presumably revived, initial lawsuit between Briukhan and Seven D's pursuant to Rule 4:38-1. We reject these arguments and affirm.

I.

Grove's brief acknowledges that its argument against enforcing the Briukhan–Seven D's settlement is largely premised on the judge's failure to grant Grove intervention in the initial lawsuit. "Our Rules of Court govern intervention at trial, and the trial court's interpretation of those rules is subject to our de novo review." N.J. Dep't of Env't Prot. v. Exxon Mobil Corp., 453 N.J. Super. 272, 286 (App. Div. 2018) (citing Washington Commons, LLC v. City of Jersey City, 416 N.J. Super. 555, 560 (App. Div. 2010)).

While intervention as of right under Rule 4:33-1 is not discretionary, Meehan v. K.D. Partners, LP, 317 N.J. Super. 563, 568 (App. Div. 1998), "[t]he decision to grant or deny permissive intervention [under Rule 4:33-2] 'vests considerable discretion in the trial court[.]'" Exxon Mobil Corp., 453 N.J. Super.

at 286 (alteration in original) (quoting Evesham Twp. Zoning Bd. of Adjustment v. Evesham Twp. Council, 86 N.J. 295, 299 (1981)). "Because Rule 4:33-2 is 'the more liberal permissive intervention rule,' we must 'review the court's determination of a permissive intervention motion under an abuse of discretion standard.'" In re M.F., 468 N.J. Super. 197, 210 (App. Div. 2021) (quoting Exxon Mobil Corp., 453 N.J. Super. at 286–87).

However, whether a party seeks to intervene as of right or by permission,

[a]n essential prerequisite to intervention is timeliness, which should be equated with diligence and promptness. One who is interested in pending litigation should not be permitted to stand on the sidelines, watch the proceedings and express his disagreement only when the results of the battle are in and he is dissatisfied.

[Twp. of Hanover v. Town of Morristown, 118 N.J. Super. 136, 143 (Ch. Div.) (emphasis added), aff'd, 121 N.J. Super. 536 (App. Div. 1972).]

See also Exxon Mobil Corp., 453 N.J. Super. at 286 (recognizing that "mak[ing] a 'timely' application to intervene" is a prerequisite to granting intervention as of right (quoting Am. Civil Liberties Union of N.J. v. Cnty. of Hudson, 352 N.J. Super. 44, 67 (App. Div. 2002))); R. 4:33-2 (noting a motion to intervene by permission may be granted "[u]pon timely application"). In short, "[t]he court has discretion to determine the timeliness, under all the circumstances of the

intervention application, and may deny the application if deemed untimely." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.3 to R. 4:33 (2022) (citing State v. Lanza, 39 N.J. 595, 600 (1963)).

Grove argues intervention was necessary to protect its rights to the Property because Briukhan and Seven D's interests were essentially antagonistic to those rights. That is undoubtedly true.

But Grove acknowledges "that intervention [as of right] after final judgment, let alone after the time to appeal therefrom has expired, is unusual and not often granted." Indeed, Grove's inaction did not "equate[] with diligence and promptness," and it quite properly "should not be permitted to stand on the sidelines, watch the proceedings and express [its] disagreement only when the results of the battle are in and [it was] dissatisfied." Hanover, 118 N.J. Super. at 143. We conclude the judge did not abuse her discretion in denying intervention as of right.

Grove also contends that the judge should have permitted its intervention in the settled lawsuit, where the complaint had already been dismissed with prejudice because its intervention would not have "unduly delay[ed] or prejudice[d] the rights of" Briukhan or Seven D's. That argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

II.

We briefly address Grove's other arguments regarding enforcement of the settlement reached in the initial lawsuit, as well as its contention that the judge erred in vacating the lis pendens Grove filed against the property.

Grove reprises an argument it twice made before Judge Costello — that Seven D's lacked the authority under the Pending Litigation provision of the second contract to settle the initial lawsuit without Grove's consent. Grove also contends there were factual disputes about the parties' conduct that should not have been resolved on the papers, and that the initial contract was substantially modified by the settlement and was no longer "legally binding."

Judge Costello rightly noted that "[s]ettlement of litigation ranks high in our public policy." Savage v. Twp. of Neptune, 472 N.J. Super. 291, 305 (App. Div. 2022) (quoting Nolan v. Lee Ho, 120 N.J. 465, 472 (1990)). In furtherance of that policy, "our courts 'strain to give effect to the terms of a settlement wherever possible.'" Brundage v. Est. of Carambio, 195 N.J. 575, 601 (2008) (quoting Dep't of Pub. Advocate v. N.J. Bd. of Pub. Util., 206 N.J. Super. 523, 528 (App. Div. 1985)). "[A]bsent a demonstration of 'fraud or other compelling circumstances,' a court should enforce a settlement agreement as it would any

other contract." Capparelli v. Lopatin, 459 N.J. Super. 584, 603–04 (App. Div. 2019) (quoting Jennings v. Reed, 381 N.J. Super. 217, 227 (App. Div. 2005)).

Grove argues the facts here represent the exception to the general policy supporting enforcement of litigation settlements because Seven D's was engaged in fraudulent behavior. Perhaps that is true, and certainly Grove will have the opportunity to prove that claim in the second lawsuit filed against Seven D's. But there was absolutely no proof that Briukhan engaged in fraud, nor were there any other "compelling circumstances" to deny Briukhan the benefit of his bargained-for settlement.

Moreover, the fact that Briukhan decided to pay more for the Property under the terms of the settlement than the purchase price contained in the first contract had no legal import. Grove cites no authority to support its contention that somehow the settlement was a third contract, entered into after its contract with Seven D's, making the settlement unenforceable.

Regarding Judge Costello's discharge of its *lis pendens*, Grove argues the judge erred because Grove was a bona fide purchaser (BFP) pursuant to a valid contract to buy the Property, and Grove would likely succeed in the second lawsuit and obtain a judgment for specific performance. We disagree.

"A lis pendens should be discharged if the plaintiff has no right to a lien or a claim affecting the realty in question but only to some different claim or right against the defendant." Cole, Schotz, Bernstein, Meisel & Forman, PA v. Owens, 292 N.J. Super. 453, 461–62 (App. Div. 1996) (citing O'Boyle v. Fairway Prods., Inc., 169 N.J. Super. 165, 167 (App. Div. 1979)). N.J.S.A. 2A:15–7(b) governs a court's determination of a motion to discharge a lis pendens:

Any party claiming an interest in the real estate affected by the notice of lis pendens may, at any time thereafter, file with the court . . . a motion for a determination as to whether there is a probability that final judgment will be entered in favor of the plaintiff sufficient to justify the filing or continuation of the notice of lis pendens. The plaintiff shall bear the burden of establishing such probability.

The filing of a lis pendens creates a "vise-like grip upon the property, freezing the status quo," and because it "may be seen as a . . . taking," it raises constitutional due process issues. Trus Joist Corp. v. Treetop Assocs., 97 N.J. 22, 32 (1984). In Fravega v. Sec. Savs. & Loan Ass'n, the court observed the purpose of N.J.S.A. 2A:15–7(b) is to "prevent the unfair use of lis pendens which creates a hardship on the owners of real estate where the alleged interest in the property is uncertain or problematical." 192 N.J. Super. 213, 218 (Ch. Div. 1983).

Judge Costello properly concluded Grove failed to demonstrate a probability of success on its specific performance claim, the only cause of action in the second lawsuit that implicated Grove's interest in the Property. In Marioni v. 94 Broadway, Inc., we recognized that a third-party purchaser, Lindner, was not a BFP entitled to defeat the initial contract purchaser's claim for specific performance. 374 N.J. Super. 588, 610 (App. Div. 2005).

Lindner possessed actual knowledge, and was given constructive notice, of [the] plaintiff's contract with [the seller] — facts which preclude Lindner's claim to the status of [BFP] and which relegate Lindner's rights to a position inferior to [the] plaintiff's rights. As a result, neither Lindner's contract with [the seller] nor the actual conveyance of a deed to Lindner could defeat [the] plaintiff's right to specific performance.

[Ibid.]

Judge Costello properly discharged Grove's lis pendens.

Given our decision, we need not address Grove's final argument that consolidation of the initial and second lawsuit is necessary.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION